

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
J.A. MAKSYM, R.Q. WARD, J.E. STOLASZ  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**BENIA N. O'NEAL  
SEAMAN (E-3), U.S. NAVY**

**NMCCA 201100307  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 18 February 2011.

**Military Judge:** CDR Douglas Barber, Jr., JAGC, USN.

**Convening Authority:** Commanding Officer, USS DWIGHT D. EISENHOWER (CVN 69).

**Staff Judge Advocate's Recommendation:** LCDR K.B. Lofland, JAGC, USN.

**For Appellant:** LT Toren Mushovic, JAGC, USN.

**For Appellee:** Maj Paul Ervasti, USMC.

**17 May 2012**

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**OPINION OF THE COURT**  
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**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of two specifications of attempted distribution of methylenedioxy-methamphetamine (ecstasy), and one specification each of, escape from custody, and wrongful use of marijuana, in violation of Articles 80, 95, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 895, and 912a. The military judge also convicted

the appellant, contrary to his pleas, of one specification of assault upon a person in the execution of law enforcement duties and one specification of assault upon a petty officer in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928. The appellant was sentenced to confinement for 11 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority's action of 15 March 2012 reduced confinement to 9 months, but otherwise approved the adjudged sentence and, except for the bad-conduct discharge, ordered the sentence executed. The pretrial agreement had no effect on the sentence.

This is the third time this case is before us. The initial convening authority's action, dated 3 June 2011, was set aside by this court because it was ambiguous. *United States v O'Neal*, No. 201100307, unpublished op. (N.M.Ct.Crim.App. 19 Jan 2012) (per curiam). A second convening authority's action, dated 26 January 2012, was set aside by this court's order of 07 February 2012 for remand to an appropriate convening authority for proper post-trial processing. RULES FOR COURTS-MARTIAL 1105-1107(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). This court also ordered the convening authority to summarize Specifications 1, 3 and 4 of Charge II in the court martial order to accurately reflect the appellant's guilty pleas. This resulted in the convening authority's action of 15 March 2012.

The appellant raises three assignments of error: 1) the convening authority disapproved the bad-conduct discharge; 2) the evidence is factually insufficient to sustain the conviction for the charge and specifications alleging assault; and, 3) the promulgating order incorrectly records the finding to Specification 3 of Charge II. We find assignments of error one and three moot as a result of our decision of 19 January 2012 setting aside the initial convening authority's action as ambiguous and the current court-martial order of 15 March 2012. We further find that Specifications 1 and 2 of Charge III (assaults) and the specification under Charge I (escape from custody) constituted an unreasonable multiplication of charges. We take corrective action in our decretal paragraph. Following our corrective action, we find that no error materially prejudicial to the appellant's substantial rights remains. Arts. 59(a) and 66(c), UCMJ.

## **Background**

The appellant was apprehended for distributing what he believed was ecstasy. He was informed that he would be placed in pretrial confinement and was transported to the Portsmouth Naval Hospital for a brig physical on 26 November 2011. Three escorts accompanied the appellant: Petty Officers Waller, Rodriquez, and Bias. The appellant was in handcuffs with a belt strap attached. He was escorted to the emergency room waiting area, and then into a room to have his vital signs read. The appellant was escorted into the exam room by Petty Officer Rodriquez. Petty Officers Waller and Bias remained in the emergency room waiting area. Petty Officer Rodriquez removed the appellant's handcuffs to have his blood pressure read. After his vital signs were taken, the appellant exited the exam room. Upon entering the waiting area, he dashed for the exit and was convicted of shoving Petty Officers Rodriquez and Waller as he fled from the hospital.

The testimony at trial of the four individuals involved as to exactly how and who the appellant assaulted was inconsistent. However, all four individuals were consistent in testifying that the appellant's sole purpose in fleeing the facility was to escape.

### **Unreasonable Multiplication of Charges**

As a result of the appellant's escape at the medical center, he was charged with one specification under Article 95, UCMJ (escape from custody), and two specifications under Article 128, UCMJ (assault upon person in execution of their office as a master at arms and assault upon a petty officer).

At trial, the defense brought a motion to dismiss both of the assault specifications arguing that the assault charge constituted an unreasonable multiplication of charges with the escape from custody charge. The military judge denied the motion and made factual findings which resolved the matter in favor of the Government. Record at 184-87.

The five nonexclusive factors that we use to determine whether there is an unreasonable multiplication of charges are well-established precedent. *United States v. Quiroz*, 57 M.J. 583, 585 (N.M.Ct.Crim.App. 2002), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003). Application of these factors to this record leads us to conclude that charges were unreasonably piled on against the appellant.

**(1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?**

The first factor is resolved in favor of the appellant, because he specifically objected at trial that Charge III and its two specifications and Charge I and its sole specification constituted an unreasonable multiplication of charges.

**(2) Is each charge and specification aimed at distinctly separate criminal acts?**

We also resolve this factor in favor of the appellant. Although the military judge made a specific finding that the contact made with the escorts during the escape from custody were separate and distinct acts, not incidental to the escape, that finding is unsupported by the record and it is clearly erroneous.

The MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 19(c)(5)(c) explains the term "escape," as it is used under Article 95, "may be either with or without force or artifice, and either with or without the consent of the custodian." When we consider the testimony of the appellant and the three petty officers, we are left with the clear picture that any contact that occurred between the appellant and his escorts was purely incidental to the appellant's escape.

The appellant testified that when he made his escape, he made shoulder to shoulder contact with Petty Officer Rodriguez as he ran past him. Record at 86-97. To the appellant's recollection, that was the only contact made with any of the escorts and it was purely incidental to his escape. *Id.*

Petty Officer Rodriguez testified that shortly after exiting the vitals room, he experienced "a sudden quick brush, you know, I got pushed to the side and he (the appellant) starts running." *Id.* at 116. He explained further, "I wasn't hurt or anything. I was pretty much - after he shoved me to the side. We were all kind of like, whoa, what's going on, you know. I think that I heard Waller say he's running, he's running and all three of us - well both of them started running first and then I followed behind." *Id.* at 117. He explained further that he was facing away from the appellant at the time of the contact.

*Id.* at 129. As to the force of the contact, Petty Officer Rodriguez described it as, "I was shoved out-of-the-way pretty much"; "I didn't lose so much balance to where I fell or I would fall"; "I didn't feel threatened. I didn't feel a line of threat or anything like that coming towards me specifically or individually. You could tell that his main purpose was just to get away -- to run away." *Id.* at 129-31.

Petty Officer Waller described the escape and the contact as follows; "It happened so quick. We were standing in the door to re-cuff Seaman O'Neal and then he came out of the door running. When he came out the door running I was knocked off balance. Then we gave chase, sir." *Id.* at 140. Petty Officer Waller testified that he had no recollection of how the appellant had touched him and that the incident happened "pretty quick." *Id.* at 149.

Petty Officer Bias testified that the appellant ran as soon as he exited the exam room and made contact with both Rodriguez and Waller. *Id.* at 157. He described the contact as follows: "I watched his arm go up as he got by Rodriguez and then he went the same way by AS1 Waller." *Id.*

Considering all of the above, we conclude that the escape from custody and both assault specifications are aimed at the *same* criminal act.

**(3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?**

We also resolve this factor in favor of the appellant. As noted, the offensive touching that occurred was purely incidental to the appellant's escape from custody. The two specifications alleging assault make the appellant's escape appear to be a more violent transaction than it was.

**(4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure?**

Because the appellant was tried at a special court-martial the jurisdictional limits on authorized punishments prevented the appellant's punitive exposure from being unreasonably increased. Accordingly, we resolve this factor in favor of the Government.

**(5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?**

The fact that the Government went forward on the assault charge and specifications after the appellant pled guilty to the escape from custody charge, indicates the charges were not drafted to meet contingencies of proof. This suggests to us prosecutorial overreaching. See *Quiroz*, 57 M.J. at 586.

**Conclusion**

The findings of guilty to Charge III and its two specifications are set aside, and that charge and its specifications are dismissed. *United States v. Roderick*, 62 M.J. 425, 433 (C.A.A.F. 2006). The remaining findings of guilty are affirmed. In accordance with *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986), and *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990), we find that the sentencing landscape has not dramatically changed and we have reassessed the sentence. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006). Upon reassessment, we find that the sentence that would have been imposed in the absence of the trial error is the same as that originally imposed by the military judge. We affirm the sentence as approved by the convening authority.

For the Court

R.H. TROIDL  
Clerk of Court